114. AT&T suggests that responses to interrogatories should be filed with the Commission.[331] APCC suggests that a "good cause waiver" should be available to grant relief to parties from discovery limitations.[332] Ameritech suggests, and BellSouth concurs in its Reply comments, that the Commission implement procedures such as those contained in Section 252(b)(2) of the Act, that are applicable to compulsory arbitration of interconnection disputes.[333] GST, KMC and MFS suggest the implementation of mandatory "meet and confer" conferences between the parties to address procedural issues and potential disputes prior to the initial status conference.[334] AT&T supports the meet and confer concept.[335] CBT opposes mandatory meet and confer conferences, arguing that the Commission should not be adding unnecessary requirements for the parties to fulfill.[336] ICG suggests that the Commission make clear that it will not tolerate form objections and answers.[337] In light of the Commission's proposals to permit interrogatories only when it determines such discovery is appropriate, AT&T suggests deleting Section 1.729(e) of the Commission's rules because it would be superfluous.[338]

c. Discussion

115. For the reasons discussed below, we eliminate the rule authorizing the parties to initiate self-executing discovery. In its place, we have adopted rules and policies that carefully balance the rights of the parties and the need to expedite the resolution of complaints in a number of important aspects. These new rules: (1) require complainants and defendants to exercise diligence in compiling and submitting facts to support their complaints and answers; (2) discourage reliance on the often protracted discovery process as a means to identify or develop information needed to support a complaint or answer;

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331 AT&T Comments at 16.

332 APCC Comments at 5.

333 Ameritech comments at 2; BellSouth Reply at 6. Section 252(b)(2) of the Act provides

> (2) DUTY OF PETITIONER -
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> (A) A party that petitions a State commission under paragraph 1 shall, at the same time as it submits the petition, provide the state commission all relevant documentation concerning -
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> (i) the unresolved issues;
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> (ii) the position of each of the parties with respect to those issues; and
>
> (iii) any other issue discussed and resolved by the parties.
>
> (B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

334 GST Comments at 10; KMC Comments at 10-11; MFS Comments at 10.

335 AT&T Reply at 7-8.

336 CBT Comments at 5.

337 ICG Comments at 10.

338 AT&T Comments at 16. Section 1.729(e) provides the Commission with discretion to prohibit discovery relating solely to damages issues until after a finding of liability. 47 C.F.R. § 1.729(e).

(3) give parties an opportunity to make their cases for or against limited discovery early in the proceedings; (4) reduce the need for time-consuming motions to compel; (5) provide Commission staff with more control over the discovery process; and (6) limit each party's ability to use discovery for delay or other purposes unrelated to the merits of the dispute. The 1996 Act imposed both statutory deadlines on certain complaints and an overall pro-competitive policy on the handling of all formal complaints, thus signifying an intent that we resolve quickly disputes involving allegations of interference in the development of competition in telecommunications markets. The discovery procedures under the old rules were time consuming and were susceptible to abuses that often caused undue delays in our consideration of the merits of a complainant's claims. The discovery rules adopted in this proceeding expedite the discovery process, which, in turn, expedites the resolution of all formal complaints, in accordance with the requirements and policies of the 1996 Act.

116. The new procedures and policies allow the staff to consider and rule on reasonable, properly focused requests for interrogatories and other discovery on an expedited basis as follows:

a) With its complaint, a complainant may file with the Commission and serve on the defendant requests for ten written interrogatories. A defendant may file with the Commission and serve on the complainant requests for ten written interrogatories during the period beginning with the service of the complaint and ending with the service of the answer.[339]

b) Within three calendar days following service of the answer, a complainant may file with the Commission and serve on the defendant requests for five written interrogatories. Such additional interrogatories shall be directed only at specific factual allegations made by the defendant in support of its affirmative defenses.[340]

c) Requests for interrogatories shall contain (1) a listing of the interrogatories requested; and (2) an explanation of why the information sought in each interrogatory is necessary to the resolution of the dispute and unavailable from any other source.[341]

d) Oppositions and objections to the requests for interrogatories shall be filed with the Commission and served on the propounding party (1) by the defendant, within ten calendar days of service of interrogatories served simultaneously with the complaint and within five calendar days of interrogatories served following service of the answer, (2) by the complainant, within five calendar days of service of the interrogatories, and (3) in no event less than three calendar days prior to the initial status conference.[342]

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[339] *See* Appendix A, § 1.729(a).

[340] *See* Appendix A, § 1.729(a).

[341] *See* Appendix A, § 1.729(b).

[342] *See* Appendix A, § 1.729(c).

e) Section 1.730 of the current rules, which expressly authorizes parties to petition for additional "extraordinary" discovery in the form of requests for document production, depositions and additional interrogatories, shall be deleted.

f) Commission staff will be inclined to grant all reasonable requests for interrogatories and other forms of discovery to the extent permitted under any applicable statutory deadlines. It will issue rulings and direct the parties accordingly at the initial status conference.[343]

g) Commission staff retains the discretion to order on its own motion, additional discovery including, but not limited to, document production, depositions, and/or interrogatories. The staff also retains discretion to limit the scope of permissible interrogatories and to modify or otherwise relax the discovery available in particular cases where appropriate.[344]

117. These rules and policies are designed to work in conjunction with our pre-filing and format and content requirements, which are designed to improve the utility and content of the initial complaint and answer filed in a Section 208 proceeding. The rules as a whole are intended to change fundamentally the nature of the formal complaint process to enforce the Commission's long-standing requirement that "[a]ll matters concerning a claim [be pled] fully and with specificity."[345] In adhering to these fact-pleading requirements, we will further the pro-competitive policies of the 1996 Act by expediting the resolution of all formal complaints. We find that these new requirements strike a reasonable balance between, on the one hand, providing for discovery where necessary to ensure the development of a complete record and, on the other hand, preventing the use of discovery as the primary means of determining if a claim exists.

118. Some commenters express doubt that parties will disclose unfavorable information, and argue that discovery is needed to verify the accuracy of initial disclosures. The format and content rules address this concern by requiring that parties reveal the means by which they determine what documents and information to disclose.[346] Disclosure of the nature of the inquiry should significantly reduce concerns about accuracy, since a failure to address a patently relevant topic will be readily apparent. The arguments of some commenters are based on the use of the phrase "voluntary disclosure."[347] We emphasize that the phrase "voluntary disclosure" refers to the fact that the parties are obligated to disclose all information that is relevant to the resolution of a dispute in the absence of a specific discovery request. Use of the term "voluntary disclosure" does not limit the obligation of the disclosing party to identify all information that is relevant to the facts in dispute, including information that is unfavorable to the disclosing party.

119. The rules adopted address MCI's concerns that it is unfair to require complainants to file their discovery requests without an opportunity to review the answer. First, because the parties must make

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[343] *See* Appendix A, § 1.729(d).

[344] *See* Appendix A, § 1.729(h).

[345] *See* 47 C.F.R. §§ 1.720(a) and 1.721(a)(6).

[346] *See* Appendix A, §§ 1.721(a)(10), 1.724(f), 1.726(d).

[347] *See, e.g.*, GTE Comments at 10.

a good faith effort to resolve their dispute prior to the filing of the complaint, the complainant will know what to expect in the defendant's answer. Second, the rules provide the complainant with an opportunity to seek discovery on affirmative defenses first raised in the answer. In light of these factors and the time constraints of statutory deadlines, MCI's fairness argument fails.

120. We disagree with the argument that the Commission should provide discovery as a matter of right because federal court rules provide for discovery as a matter of right, in addition to required initial disclosures. While the Commission has often found the federal rules instructive, it has consistently rejected wholesale adoption of them.[348] A significant difference exists in the procedural requirements of actions brought before the different fora. Federal court rules require notice pleading while the Commission's rules require fact pleading.[349] Notice pleading anticipates the use of discovery to obtain evidence of the facts to support a complainant's claims, while fact pleading requires that a complainant know the specific facts necessary to prove its claim at the time of filing. Neither Section 208 of the Act nor the Commission's own rules and policies contemplate the expansive discovery available in federal district court, and in fact, Section 207 of the Act gives parties the option of filing their complaints in federal district court rather than with the Commission.[350] We, further, disagree with the argument that self-executing discovery is necessary because due process requires that a complainant be able to direct its case as it sees fit. As we have stated, our rules require that parties plead all matters fully and specifically, and commission staff will be inclined to grant reasonable requests for discovery to the extent permitted under any applicable statutory deadlines. In this context, a party's due process rights are fulfilled by being provided with the opportunity to request discovery and present its argument to the Commission as to why discovery is necessary in its particular case. The fact that the Commission may deny a party's discovery request, following consideration of the merits of such request, does not negate the party's right to the opportunity to make its case for discovery.

121. We disagree with the commenters who state that ending self-executing discovery will result in an avalanche of motions for discovery, which would lengthen the discovery process and could result in inconsistent discovery rulings. Our rules will provide for the quick resolution of discovery disputes by the date of the initial status conference, which will be held ten days after the answer is filed. We note that these same commenters strongly support proposals requiring the staff to play a more active role in the discovery process by defining the timing and scope of necessary discovery.[351] These rules allow Commission staff to take a more active role in the discovery process to meet statutory deadlines and expedite the resolution of all formal complaints.

122. We conclude that SWBT's suggestion that the Commission require the parties to engage in good faith discovery discussions prior to the filing of the complaint is unduly burdensome. The Commission is already requiring parties to engage in good faith settlement negotiations prior to the filing

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[348] *See Amendment of Rules Governing Procedures to be Followed When Complaints are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd. 1806, 1810 (1988). *See also American Message Center v. F.C.C.*, 50 F.3d 35, 40-41 (D.C. Cir. 1995)

[349] Fed. R. Civ. Proc. 8(a); *see* Appendix A, § 1.721(a)(5).

[350] 47 U.S.C. § 207.

[351] CBT Comments at 10-11; ICG Comments at 16; MFS Comments at 12; U S West Comments at 10.

of a complaint.[352] As part of that obligation, we anticipate that parties will exchange relevant documentation to the extent that it would help to resolve conflicts. We also conclude that SWBT's suggestion would be likely to raise numerous disputes after the filing of the complaint, *e.g.*, concerning what constitutes "good faith discovery," that would consume more time and resources than would be saved by the implementation of such a requirement.

123. SWBT suggests that the Commission adopt a rule providing defendants with the right to remove disputes to federal court where broader discovery is available. We decline to adopt this suggestion because it would eliminate rights provided to complainants in the Act. The Act provides complainants with the choice of filing claims with the Commission or in federal court.[353] The 1996 Act further provides complainants with the right to have the Commission resolve certain types of complaints within statutory deadlines.[354] Because those deadlines are enforceable only at the Commission, providing a defendant with the right to remove any claim to federal court would provide it with the ability to eliminate the complainant's right to have its dispute resolved within the applicable statutory deadline. SWBT, furthermore, made this proposal in conjunction with its support for the proposal to eliminate all discovery, which we have declined to adopt.

124. Additionally, we reject Ameritech's proposal that, as a means to effective discovery, the Commission adopt disclosure requirements similar to those in Section 252(b)(2), which are for compulsory arbitration of interconnection agreements. Such a proposal is unworkable in light of the fact that Section 252(b)(2) procedures would not accommodate the variety of complaints that may be brought before the Commission.[355] Section 252(b)(2) disclosure procedures are directed at arbitration of disputes of a particular nature before state commissions. Our voluntary disclosure rules will provide the benefits of that provision, the initial disclosure of relevant documentation, while the discovery rules adopted herein contain sufficient flexibility to be adapted to the unique circumstances of individual cases.

125. The issue of requiring a meet and confer conference to discuss discovery disputes is addressed in the Status Conference section of this *Report and Order*.[356]

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[352] *See* Appendix A, § 1.721(a)(7).

[353] 47 U.S.C. § 207.

[354] 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), 275(c).

[355] Ameritech Comments at 2.

[356] *See supra* "Status Conferences" section.

2. Reduction of the Administrative Burden of Filing Documents

a. The *Notice*

126. In the *Notice* we sought comment on methods to reduce the administrative burden on the Commission of accepting filed documents, either identified in initial filings or obtained through discovery, including implementation of a computer scanning requirement for large document productions.[357]

b. Comments

127. Those parties that commented on this proposal oppose the imposition of a scanning requirement.[358] CBT argues that such a requirement would be a waste of resources while CompTel argues it would be too burdensome.[359]

c. Discussion

128. We decline to adopt a scanning requirement for all large document productions. Instead, we shall provide Commission staff with the discretion, in individual cases involving the review of a large number of documents, to require the parties to provide the documents to the Commission in a scanned or other electronic format. Material in any electronic format shall be indexed and submitted in such manner as to facilitate the staff's review of the information.[360] Commission staff shall have discretion to reach an agreement with the parties about the appropriate technology to be used in light of the needs of the staff and the current cost and availability of document management technology. Commenters opposed to the imposition of a scanning requirement make general statements that a scanning requirement would be unjustifiably costly and burdensome to implement. Because such a requirement will be imposed on an individualized basis, the staff shall decide on a case-by-case basis whether the nature of the production involved will justify the cost and burden of electronic formatting.

129. We also recognize that a significant number of complex technical issues that are beyond the scope of the *Notice* would have to be addressed prior to the implementation of a comprehensive document scanning requirement. Because scanning technology is varied and not universally compatible, the implementation of a standardized scanning requirement would require us to choose a single type of scanning technology. Several complex questions would therefore arise, including, but not limited to, what information should be placed in identifying fields and whether the documents must be searchable by text. Because of these complex technical questions, we decline to impose a scanning requirement at this time,

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[357] *Notice* at 20845.

[358] *See, e.g.*, CBT Comments at 12; Comptel Comments at 8.

[359] CBT Comments at 12; Comptel Comments at 8.

[360] *See* Appendix A, § 1.729(g).

although we may address this issue again at a later date, following our consideration of possible procedures for allowing the electronic filing of documents in GC Docket 97-113.[361]

3. Voluntary Agreements for the Recovery of Discovery Costs

a. The *Notice*

130. One of the goals in the *Notice* was to identify ways to encourage parties to exercise diligence in identifying and satisfying their discovery needs. For example, although the Commission does not have authority to award costs in the context of a formal complaint proceeding,[362] we sought comment on whether encouraging formal complaint parties to agree among themselves to a cost-recovery system for discovery would facilitate the prompt identification and exchange of information.[363] As an example, we suggested that the parties could stipulate that the losing party in the complaint proceeding would bear the reasonable costs associated with discovery, including reasonable attorneys' fees.[364]

b. Comments

131. Although GST, KMC and MFS support the Commission encouraging parties to enter into voluntary cost recovery agreements, Ameritech, CBT, CompTel, PTG, SWBT, and TCG oppose such a position.[365] CompTel, GTE, PTG, and SWBT argue that parties will be unable to agree to a cost recovery system.[366] Ameritech argues that parties will be tempted to convince the decisionmaker to award enough money to the "losing" party to offset the costs of discovery.[367] Ameritech suggests the alternative of giving the factfinder the discretion to decide cost recovery issues and award financial damages for the filing of frivolous complaints.[368] TCG argues that, if the Commission encouraged such agreements, parties might not comply with discovery requests unless they are compensated.[369] CBT argues that discovery abuse would not be lessened by having the loser pay the cost of discovery, since the winning party is as

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361 *See Electronic Filing of Documents in Rulemaking Proceedings*, Notice of Proposed Rulemaking, 12 FCC Rcd 5150 (1997).

362 *See Turner v. FCC*, 514 F.2d 1354, 1356 (1975); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, 1257 n.51 (1985).

363 *Notice* at 20845.

364 *Notice* at 20845.

365 GST Comments at 12; KMC Comments at 13; MFS Comments at 13; Ameritech Comments at 3; CBT Comments at 12; CompTel Comments at 8; PTG Comments at 20; SWBT Comments at 7; TCG Comments at 5.

366 CompTel Comments at 8; GTE Comments at 11; PTG Comments at 20; SWBT Comments at 7.

367 Ameritech comments at 3.

368 Ameritech comments at 3.

369 TCG Comments at 5.

likely to have abused discovery.[370] CBT supports, however, requiring parties to compensate each other for extraordinary efforts to comply with discovery requests.[371] CompTel suggests that the Commission should set a reasonable copying fee.[372]

c. Discussion

132. We decline to encourage voluntary cost recovery agreements among parties for several reasons. We conclude that recovery of discovery costs will not be a significant problem in formal complaints because the rules we adopt today will make extensive discovery the rare exception rather than the general rule, regardless of the willingness of parties to pay for discovery. Furthermore, most of the commenters oppose this proposal. Since the majority of the commenters are potential parties to formal complaints before the Commission, we find it unlikely that parties would enter into such voluntary cost recovery agreements.

4. Referral of Factual Disputes to Administrative Law Judges

a. The *Notice*

133. In the *Notice* we proposed to amend our rules to authorize the Common Carrier Bureau and the Wireless Telecommunications Bureau, on their own motion, to refer disputes over material facts in formal complaint proceedings to an administrative law judge ("ALJ") for expedited hearing.[373] The disputes referred would be those that cannot be resolved without resorting to formal evidentiary proceedings,[374] although adjudication of novel questions of law or policy would remain outside of the delegated authority of the ALJ.[375] We noted that, as a practical matter, the Bureaus would refer issues only where necessary to determine acts or omissions, and not to determine the legal consequences of such acts or omissions.[376] We tentatively concluded that expanding the Bureaus' delegated authority in this limited way would provide the staff with an important tool for resolving disputes over material facts that cannot be resolved without resort to formal evidentiary proceedings.[377]

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370 CBT Reply at 4.

371 CBT Comments at 12.

372 CompTel Comments at 8.

373 *Notice* at 20846.

374 *Notice* at 20846-47.

375 *See* 47 C.F.R. § 0.291(d).

376 *Notice* at 20846.

377 Consistent with the authority delegated in Section 0.151 of our rules, 47 C.F.R. § 0.151, the Chief Administrative Law Judge would have the discretion to establish such expedited procedures and requirements as are necessary to receive documentary evidence, examine and cross-examine witnesses and prepare findings of fact within the timetables specified in any hearing designation order issued by the Commission or the staff pursuant to delegated authority. In the past we have designated pole attachment complaints to the Commission's administrative law judges. *See, e.g., TCA Management Co. v. Southwestern*

b. Comments

134. The majority of commenters support the adoption of a rule authorizing the Common Carrier Bureau and the Wireless Telecommunications Bureau to refer factual disputes to an ALJ for resolution.[378] Bechtel & Cole's support for authorizing such referral, however, is contingent upon the establishment of deadlines for ALJs to resolve such disputes, as well as a clear definition of the role and responsibility of the ALJ in each case.[379] CBT suggests that the ALJ hearing be located at the site of the alleged violation.[380] GST, KMC and MFS argue generally that the procedures for referral of factual disputes to ALJs should be clarified.[381] BellSouth, however, opposes the referral of factual issues to ALJs, except as a last resort, arguing that it would only add a layer of procedural rules while still requiring the Commission to make a legal determination on the case itself.[382] BellSouth supports referral of disputes to ALJs for hearing only if the Commission adopts the pole attachment complaint rules.[383]

c. Discussion

135. We amend Section 0.291 of the rules to authorize the Chief of the Common Carrier Bureau to designate factual disputes for evidentiary hearings before an ALJ and clarify that the change in the Bureau's delegated authority is intended to authorize the Bureau to designate factual disputes for hearing even in those cases where the facts to be determined may be considered "novel."[384] We retain, however, the existing prohibition on the Common Carrier Bureau designating for hearing those issues involving novel questions of law or policy which cannot be resolved under outstanding precedents or guidelines. No revision is required in the existing delegated authority of the Wireless Telecommunications Bureau, which now permits it to delegate novel factual issues for hearing.[385]

Public Service Company, 10 FCC Rcd 11832 (1995). The administrative law judges were instrumental in achieving settlement of all such cases before hearing.

[378] ACTA Comments at 7; AT&T Comments at 3-4; CBT Comments at 12-13: CompTel Comments at 8; GST Comments at 14; GTE Comments at 12; KMC Comments at 14; MFS Comments at 14; PTG Comments at 20; TRA Comments at 19; TCG Comments at 5.

[379] Bechtel & Cole comments at 4.

[380] CBT Comments at 12-13.

[381] GST Comments at 14; KMC Comments at 14; MFS Comments at 14.

[382] BellSouth Comments at 16.

[383] BellSouth Comments at 16.

[384] *See* Appendix A, §§ 0.291, 0.331.

[385] *See* 47 C.F.R. § 0.331.

136. Factual disputes that are referred to an ALJ for hearing shall be referred to such ALJ through a hearing designation order.[386] The hearing designation order may set a recommended deadline for the ALJ to certify the record by, and, if time permits, issue a recommended decision on the factual dispute. The presiding judge shall certify the record and if time permits, issue a recommended decision, pursuant to the instructions contained in the hearing designation order, before referring the matter back to the Commission for, *inter alia*, final resolution of all outstanding factual, legal and policy issues.[387] We clarify that, where the Common Carrier Bureau or the Wireless Telecommunications Bureau designates a dispute for expedited hearing, the designating Bureau may authorize the presiding judge to schedule the proceedings to enable such deadline to be met.[388] We further clarify that the Common Carrier and Wireless Telecommunications Bureaus will not refer a factual dispute to an ALJ for hearing where the time required by the ALJ to complete a hearing on such dispute would preclude the Commission from meeting an applicable statutory deadline.

137. There is broad support among the commenters for the use of ALJs to resolve factual disputes. After due consideration of commenters' concerns about compliance with statutory deadlines, we conclude that the existing rules provide the Commission with the authority to request, in a hearing designation order, that disputes be resolved by an ALJ within a set period of time consistent with the final Commission decision complying with the statutory deadline and to authorize ALJs to use discretion in the application of their hearing rules[389] to ensure compliance with the deadline recommended by the Commission.[390] We conclude, in addition, that the concerns of some commenters about such referrals slowing down the complaint process are unwarranted. The Commission's obligation to comply with statutory deadlines is not eliminated by such referral. Referral of factual disputes to ALJs will, in fact, expedite the process because referrals will be used in those circumstances where the factual disputes cannot be resolved promptly, if at all, on a written record. In such cases, it would take longer for the Commission to resolve such disputes itself without a hearing than it would for the Commission to do so after a hearing before an ALJ. ALJs are, furthermore, expert triers of fact and are well-situated to conduct their proceedings within the time frames given by the Commission, such that sufficient time will remain for the Commission to issue its decision in compliance with the statutory deadline. We also conclude that ALJ hearings will be held at the offices of the Commission in Washington, D.C., unless otherwise ordered by the Commission. It would be impractical to provide for hearings at the location of each dispute in light of both the time limitations that may be imposed on the ALJs and the limited resources of the Commission.

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386 The Bureau responsible for handling the complaint generally will not be a party to the ALJ hearing. In the event that the responsible Bureau becomes a party to the hearing, the Bureau staff involved with the hearing shall not be involved in the resolution of that complaint, in order to protect the neutrality of that Bureau's decisionmaking staff.

387 47 C.F.R. § 1.274(a).

388 47 C.F.R. §§ 1.3, 1.243.

389 47 C.F.R. §§ 1.201-1.364.

390 47 C.F.R. §§ 1.3, 1.243.

138. Additionally, we note that the Enforcement Task Force is currently evaluating whether it may be appropriate, in certain limited categories of disputes, to conduct mini-trials or some other form of live evidentiary proceeding, either before an ALJ or the Task Force. If adopted, this test procedure, subject to careful time constraints, would allow parties a substantially greater opportunity to present live testimony and oral argument than is contemplated by the hearings conducted pursuant to designation orders.

H. Status Conferences

139. The *Notice* proposed to use status conferences to speed up the formal complaint process in order to enable compliance with the newly imposed statutory deadlines and overall streamlining of the formal complaint procedures.[391] The status conference proposals were intended to work in conjunction with the modifications of the briefing and discovery rules.

1. The Initial Status Conference

a. The *Notice*

140. We proposed to modify our rules concerning status conferences to improve the ability of the Commission staff to render prompt decisions and order any necessary actions by the parties.[392] We proposed to require that, unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings ten business days after the defendant files its answer to the complaint.[393] Such an early status conference would be used to discuss such issues as claims and defenses, settlement possibilities, scheduling, rulings on outstanding motions, the necessity of and, if necessary, scope and/or timetable of discovery.[394]

b. Comments

141. A number of commenters support scheduling the initial status conference ten days after the filing of the answer.[395] Several commenters, such as CompTel, MCI, Nextlink, and PTG, however, assert that it may be unrealistic for parties to be required to argue all discovery issues in that short a time period.[396] They suggest either a second status conference or that the initial status conference be held

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[391] *Notice* at 20847.

[392] *Notice* at 20847.

[393] *Notice* at 20847.

[394] *Notice* at 20847.

[395] *See, e.g.*, ACTA Comments at 7; AT&T Comments at 8; Bell Atlantic Comments at 5; U S West Comments at 15-16.

[396] CompTel Comments at 8; MCI Comments at 20; Nextlink Comments at 7; PTG Comments at 21.

twenty to thirty days after the filing of the answer.[397] AT&T, CBT, PTG, and U S West argue that parties should continue to be permitted to attend status conferences by telephone conference call.[398]

142. The commenters agree that the issues to be resolved at the initial status conference should include the scope and scheduling of discovery and the briefing schedule.[399] The cable entities state that they envision the initial status conference as the "focal point of the complaint proceeding."[400] PTG suggests the scheduling of a formal settlement conference at that time.[401] GST, KMC, and MFS also propose to have parties attend "meet and confer" conferences prior to the initial status conference so that agreements reached and disputes remaining unresolved after the meet and confer may be reduced to writing and given to the staff at the initial status conference.[402] GST, KMC, and MFS suggest that the following subjects be discussed at the meet and confer: (1) the necessity and/or scope of discovery beyond the exchange of documents and information designations; (2) if depositions or affidavits are necessary, and if so, the number and proposed dates; (3) the timetable for completion of discovery; (4) the need or desirability of referring technical issues to an neutral expert; (5) settlement possibilities; (6) if briefing is necessary; (7) whether parties are willing to have damages claims resolved separately from liability issues using the supplemental complaint process, where such action has not already taken place;[403] (8) disagreements over designation of documents as confidential or proprietary; (9) in Section 271(d)(6)(B) cases, whether parties can agree to waive the ninety-day resolution deadline; and (10) the draft joint statement of stipulated facts and key legal issues.[404] AT&T and the cable entities support requiring the meet and confer,[405] while CBT opposes the meet and confer because it argues that the Commission should not impose additional requirements on parties.[406]

c. Discussion

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397 *See* MCI Comments at 20; PTG Comments at 21.

398 AT&T Comments at 21; CBT Comments at 13; PTG Comments at 22; U S West Comments at 15.

399 *See, e.g.*, AT&T Comments at 20; Bell Atlantic Comments at 6.

400 Cable Entities Reply at 12.

401 PTG Comments at 22.

402 GST Comments at 14; KMC Comments at 15; MFS Comments at 15.

403 *See* supra "Damages" section.

404 GST Comments at 11-12; KMC Comments at 11-12; MFS Comments at 11.

405 AT&T Reply at 8; Cable Entities Reply at 9.

406 CBT Reply at 5.

143. We require that the initial status conference take place ten business days after the date the answer is due to be filed unless otherwise ordered by the staff.[407] Setting the initial status conference date for ten business days after the date the answer is due to be filed will enable Commission staff to render decisions and/or order necessary actions promptly. Commission staff retain the discretion to permit parties to attend status conferences by telephone conference call on a case-by-case basis.

144. Commenters that oppose scheduling the initial status conference for ten business days after the date the answer is due to be filed claim that it may be unrealistic to require the parties to address discovery issues so early in the proceeding. In response to these commenters, we shall use a complaint with a ninety-day resolution deadline as an example. In a ninety-day complaint, the date of the initial status conference is 34 days[408] into the proceeding under the amended rules. In other words, over one third of the time allocated for resolution of such complaint will have passed before the status conference takes place. In the remaining fifty-six days, the parties will be required to comply with any discovery ordered and to draft briefs to include such discovery findings, *and* the staff will be required to consider all submissions by the parties and issue a decision taking appropriate action. Given these requirements, it is necessary for the parties and the Commission to move the proceeding along with great speed. Even if the complaint is not subject to such an abbreviated schedule, the expedited resolution of all formal complaints is essential to fostering and maintaining competition in accordance with the goals of the 1996 Act. Furthermore, the requirement of an early initial status conference will not be as burdensome as some commenters envision. Our status conference requirement must be considered in conjunction with the establishment of requirements for pre-filing activities, format and content of pleadings, and discovery procedures. The pre-filing activities will narrow the scope of disputed issues.[409] The format and content requirements will reduce the amount of discovery that is necessary by requiring the disclosure of relevant evidence at the complaint and answer stage of a formal complaint proceeding.[410] The new discovery procedures will require the filing of all requests for discovery, as well as objections and oppositions thereto, prior to the initial status conference, to enable the staff to address discovery issues at the initial status conference.[411] Finally, Commission staff will retain the discretion to modify the scheduling of the initial status conference when it is warranted by the facts and circumstances of an individual case.[412]

145. We also adopt, in part, the proposal made by GST, KMC, and MFS to require the parties to meet and confer prior to the initial status conference. Parties will be required to schedule and attend

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[407] *See* Appendix A, § 1.733(a).

[408] The initial status conference will be held 10 business days after the date the answer is due to be filed. The answer is due to be filed 20 days after service of the complaint. Ten business days will be 14 calendar days, unless a federally observed holiday falls within that period. Therefore, the status conference will take place on the 34th day after the date the complaint is filed and served on complainant. *See* Appendix A, § 1.733(a).

[409] *See supra* "Pre-Filing Activities, Certification of Settlement Attempts" Section.

[410] *See supra* "Format and Content" section.

[411] *See supra* "Discovery" section.

[412] *See* Appendix A, § 1.733(a).

a meet and confer conference amongst themselves prior to the initial status conference to discuss the following issues: (1) settlement prospects; (2) discovery; (3) issues in dispute; (4) schedules for pleadings; (5) joint statements of stipulated facts, disputed facts, and key legal issues; and (6) in a Section 271(d)(6)(B) proceeding, whether the parties agree to waive the ninety-day resolution deadline.[413] All proposals agreed to and disputes remaining must be reduced to writing and submitted to the staff two business days prior to the initial status conference.[414] This submission is to be made separately from the joint statement of disputed and undisputed facts and key legal issues that is due on the same date.[415] Our requirement that the parties meet and confer will prepare the parties for a productive status conference because it will require the parties to consult early on substantive and procedural issues. The requirement to meet and confer should also eliminate any element of surprise that might prevent parties from reaching agreements at the status conference, due to a party needing time to consider an opponent's newly disclosed position on a particular issue. CBT's argument against the imposition of further requirements[416] is unpersuasive. The meet and confer will not require the parties to address any new issues, but rather imposes an earlier deadline for completing activities which the parties would have to perform in any case.

2. Status Conference Rulings

a. The *Notice*

146. In the *Notice*, we proposed to modify the requirement that the staff memorialize oral rulings made in status conferences.[417] We proposed that, within twenty-four hours of a status conference, the parties in attendance, unless otherwise directed, would submit to the Commission a joint proposed order memorializing the oral rulings made during the conference.[418] Commission staff would review and make revisions, if necessary, prior to signing and filing the submission as part of the record.[419] To facilitate the submission of these joint proposed orders, we further proposed that parties be allowed, but not required, to tape record the staff's summary of its oral rulings or, alternatively, to transcribe the status conference proceedings.[420] We sought comment on these proposals and any other alternative proposals.[421]

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[413] *See* Appendix A, § 1.733(b)

[414] *See* Appendix A, § 1.733(b)

[415] *See supra* "Other Required Submissions, Joint Statement of Stipulated Facts" section.

[416] CBT Reply at 5.

[417] *Notice* at 20848.

[418] *Notice* at 20848.

[419] *Notice* at 20848.

[420] *Notice* at 20848.

[421] *Notice* at 20848.

b. Comments

147. Most commenters, including ACTA, ATSI, Bell Atlantic, GTE, and ICG, support requiring parties to file a joint proposed order within twenty-four hours of a status conference.[422] ACTA, AT&T and GTE suggest that the Commission provide an alternative procedure for parties that cannot agree on a proposed order.[423] Bell Atlantic suggests that the Commission provide the parties with resources to draft the proposed order on-site following the conference, with staff remaining available for consultation.[424] CBT, NYNEX, and PTG oppose requiring parties to file a joint proposed order memorializing the status conference rulings. They argue that parties will be unable to agree on the content of such an order and that the Commission staff member making the ruling is in the best position to know what was intended by the ruling.[425] AT&T suggests that joint proposed orders would be unnecessary if the parties have made a stenographic record.[426]

148. Commenters are split regarding the allowance of audio recording and/or the use of stenographers at status conferences. ICG supports audio recording of the entire status conference.[427] GST, KMC, and MFS support the audio recording of a summary of the staff's oral rulings, but oppose the use of a stenographer as being unnecessary.[428] SWBT opposes using a stenographer because of concern that a transcribed record may have a chilling effect on the free flow of discussions at status conferences.[429]

c. Discussion

149. We require parties to provide the Commission with a joint proposed order memorializing the rulings made at each status conference.[430] Because of the many important issues that will be resolved during the status conference, a written record of the rulings will be an essential reference and organizational tool for the parties and the Commission. Requiring the parties to provide a joint proposed order will allow the Commission to focus its scarce resources on other aspects of the complaint process. Requiring the parties to submit such joint proposed order by the end of the business day following the status conference is necessary because compliance with rulings made at status conference may require action within a matter of days. Such time sensitivity requires that any confusion or dispute among the

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[422] ACTA Comments at 7; ATSI Comments at 14; Bell Atlantic Comments at 6; GTE Comments at 12; ICG Comments at 17.

[423] ACTA Comments at 7; AT&T Comments at 20-21; GTE Comments at 12.

[424] Bell Atlantic Comments at 6.

[425] CBT Comments at 13; NYNEX Comments at 11; PTG Comments at 22.

[426] AT&T Comments at 20.

[427] ICG Comments at 17.

[428] GST Comments at 15; KMC Comments at 15; MFS Comments at 15.

[429] SWBT Comments at 8.

[430] *See* Appendix A, § 1.733(f).

parties over rulings made at the status conference be brought to the attention of Commission staff as early as possible. It is instructive to note that the Commission's *ex parte* rules require parties making oral *ex parte* presentations to file a written memorandum with the Commission's Office of the Secretary that summarizes the data and arguments presented on the next business day after the presentation.[431] It has been our experience that parties do not have difficulties complying with such requirement. As explained below, we have eased the burden of compliance with this requirement by providing parties with the opportunity to submit either the joint proposed order or a transcript of the status conference.[432]

150. The joint proposed order shall summarize the rulings made by the staff in the status conference. If the parties cannot agree on all rulings in the joint proposed order they may submit instead a joint proposed order that contains the proposed rulings upon which they agree and alternative proposed rulings for those rulings upon which they cannot agree.[433] The joint proposed order shall comply with the format and content requirements for proposed orders,[434] and shall be filed with the Commission by 5:30 p.m. on the business day following the date of the status conference, unless otherwise directed by Commission staff.[435]

151. If parties choose to make an audio recording or stenographically transcribe parts of the status conference, they shall submit, in lieu of a joint proposed order, either a transcript of the audio recording or the stenographic transcript of such status conference within three business days following the conference, unless otherwise directed by Commission staff.[436] Parties will be permitted to make an audio recording of or stenographically transcribe only those parts of a status conference that are deemed "on the record" by Commission staff at its discretion.[437] We shall prohibit any recording in any manner of those parts of the status conference deemed "off-the-record" by the staff.[438] Any party wishing to make an audio recording of the staff's summary of oral rulings only must notify the staff and all attending parties in writing of its intent at least three business days prior to the scheduled conference.[439] Any party wishing to make an audio recording of those portions of a status conference that are "on-the-record" must secure the agreement of the attending parties and notify the staff of such intent at least three business days prior to the scheduled conference.[440] Such audio recordings shall be transcribed and such transcript submitted

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[431] 47 C.F.R. § 1.1206(b)(2).

[432] *See* Appendix A, § 1.733(f).

[433] *See* Appendix A, § 1.733(f)(1).

[434] *See supra* "Motions; Format, Content, and Specifications of Motions and Orders" section.

[435] *See* Appendix A, § 1.733(f)(1).

[436] *See* Appendix A, § 1.733(f)(2).

[437] *See* Appendix A, § 1.733(e).

[438] *See* Appendix A, § 1.733(e).

[439] *See* Appendix A, § 1.733(e).

[440] *See* Appendix A, § 1.733(e).

as part of the record no later than three business days after the conference, unless otherwise directed by the staff.[441] Parties wishing to transcribe by stenographer those portions of a status conference that are "on-the-record" must secure the agreement of the attending parties and notify the staff in writing of such intent at least three business days prior to the scheduled conference.[442] Such transcript shall be submitted as part of the record no later than three business days after the status conference, unless otherwise directed by the staff.[443] It is the sole responsibility of the party or parties choosing to make an audio recording of or stenographically transcribe any part of a status conference to make all arrangements for such recording or transcription, including, but not limited to, arrangements for payment of the costs of such recording or transcription.

152. The commenters have raised legitimate concerns that the making of a formal record of a status conference by any means may have a chilling effect on the free exchange of information by the parties. We emphasize that the staff will retain significant discretion to determine in each case what is "on-the-record" and what is "off-the-record" to prevent parties from using the record to stifle such exchanges.[444]

I. Cease Orders, Cease and Desist Orders, and Other Forms of Interim Relief

153. Certain provisions added by the 1996 Act authorize the Commission to take interim actions against LECs pending final resolution of complaints in some instances and to order permanent injunctive relief in others. Sections 260 and 275 of the Act contain nondiscrimination provisions governing the provision of telemessaging service and the provision of alarm monitoring service, respectively, by incumbent LECs.[445] Sections 260(b) and 275(c) require the Commission to issue, upon an appropriate showing by the complainant of a violation that resulted in "material financial harm," an order directing the incumbent LEC "to cease engaging" in such violation "pending a final determination" by the Commission.[446] Both sections provide that such cease orders "shall" be issued within 60 days of the filing of a complaint that satisfies the stated criteria.[447] In addition, Section 274, pertaining to electronic publishing by BOCs, authorizes the Commission (or federal district court) to issue cease and desist orders for violations of the section.[448] Unlike Sections 260 and 275, however, Section 274 contains

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441 *See* Appendix A, § 1.733(f)(2).

442 *See* Appendix A, § 1.733(e).

443 *See* Appendix A, § 1.733(f)(2).

444 *See* Appendix A, § 1.733(e).

445 47 U.S.C. §§ 260, 275.

446 47 U.S.C. §§ 260(b), 275(c).

447 47 U.S.C. §§ 260(b), 275(c).

448 47 U.S.C. § 274(d)(6)(B).

no deadline for issuing such orders, nor does it predicate the issuance of such orders on a showing of material financial harm.[449]

1. Cease and Cease and Desist Orders Under Title II of the Act and Other Forms of Interim Relief

a. The *Notice*

154. In the *Notice*, we invited comment on our tentative conclusion that the procedures prescribed in Title III (Section 312) of the Act for issuing cease and desist orders are not mandatory in Section 208 and related Title II complaint proceedings, and that the complaint provisions added by the 1996 Act give the Commission additional authority to issue cease or cease and desist orders in certain cases.[450]

155. Section 312 prescribes certain "Administrative Sanctions" available to the Commission to remedy violations of the Act and the Commission's rules and orders. Subsection 312(a) provides that the Commission "may" revoke a station license or construction permit under any one of seven enumerated factual circumstances. 47 U.S.C. § 312(a). Subsection 312(b) similarly provides that the Commission "may" order "any person" who has failed to operate substantially as set forth in a license or has otherwise violated a provision of the Act, certain provisions of Title 18 of the United States Code, or any rule or regulation of the Commission, to "cease and desist" from such action. 47 U.S.C. § 312(b). Before taking the actions prescribed in Subsections 312(a) and (b), Subsections 312(c) and (d) require that the Commission conduct "show cause" proceedings in which the Commission bears both the burden of proceeding with the introduction of evidence and the burden of proof. 47 U.S.C. §§ 312(c) and (d). We also asked commenters to address whether an order to "cease engaging in" violations under Sections 260(b) and 275(c) would be the same as an order to "cease and desist" violations under Section 274(e)(2).[451]

2. Comments

156. Apart from comments regarding the evidentiary showing that should be required to obtain cease and cease and desist orders, few commenting parties draw a distinction between the cease orders contemplated under Sections 260(b) and 275(c) and the cease and desist order described in Section 274(e)(2). Voice-Tel asserts that cease and cease and desist orders are the same and that the language between Sections 260 and 275 differs only because Section 274 gives the complainant the option of obtaining relief in federal court.[452]

157. Commenters are evenly divided, however, on the issue of whether the Commission must follow the procedures prescribed in Section 312 of the Act before issuing cease and cease and desist orders in Title II complaint proceedings. Bechtel & Cole, GST, KMC, MFS, and TRA argue that, in light of the requirement in the 1996 Act for prompt issuance of cease orders in cases alleging violations of Sections

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[449] 47 U.S.C. § 274(d)(6)(B).

[450] *Notice* at 20848-49.

[451] *Notice* at 20850.

[452] Voice-Tel Comments to *Section 260, 274, 275 NPRM* at 14.

260 and 275, Congress did not intend for Section 312 hearings to apply to cease and cease and desist orders pursuant to Section 208 and related Title II complaint proceedings.[453] These commenters argue that the application of Section 312 show cause hearings would contravene Congressional intent.[454] Bell Atlantic, CompTel, PTG, and SWBT, on the other hand, contend that Section 312 hearings are a prerequisite to the issuance of any cease or cease and desist order pursuant to the Act.[455] These commenters maintain that the D.C. Circuit Court decision in *General Telephone Co. of California v. FCC* ("*General Telephone*") establishes that Section 312 show cause hearings are required before the Commission can issue cease and cease and desist orders.[456]

c. Discussion

158. Congress clearly distinguished between cease orders in Sections 260 and 275 and cease and desist orders in Section 274. Both Sections 260(b) and 275(c) provide that, if a complaint contains an appropriate showing of a violation that results in material financial harm, the Commission "shall," within 60 days, issue an order directing incumbent LECs to "cease engaging in" the violation pending resolution of the complaint.[457] Section 274(e)(2), on the other hand, authorizes "any person" claiming that a BOC or BOC affiliate has violated Section 274 "to make application" to the Commission or the federal district courts for a cease and desist order, but does not specify circumstances in which a cease and desist order must be issued.[458] In addition, unlike Sections 260(b) and 275(c), Section 274(e)(2) contains no deadline for Commission action on applications for cease and desist orders, nor does it predicate issuance of such orders on a showing of material financial harm by the petitioner.[459] We therefore disagree with VoiceTel's argument that Congress intended Section 260 and 275 cease orders to be identical to Section 274 cease and desist orders.

159. Based on the express language of Sections 260(b) and 275(c), we conclude that any order issued by the Commission pursuant to these sections must be in the nature of an injunction directed against a defendant incumbent LEC pending a final determination on the merits of a complainant's discrimination claims. As is customarily the case with permanent or preliminary injunctive actions, orders issued under Sections 260(b) and 275(c) directing a LEC to "cease engaging in" a particular act will either

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[453] Bechtel & Cole Reply at 2; GST Comments at 16; KMC Comments at 16; MFS Comments at 15; TRA Comments at 20.

[454] Bechtel & Cole Reply at 2; GST Comments at 16; KMC Comments at 16; MFS Comments at 15; TRA Comments at 20.

[455] Bell Atlantic Comments at 7; CompTel Comments at 8-9; PTG Comments at 23; SWBT Comments at 9.

[456] See, *e.g*, CompTel Comments at 8-9, *citing General Telephone Co. of California v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 US 888 (1969).

[457] *See* 47 U.S.C. at §§ 260(b), 275(c).

[458] 47 U.S.C. at § 274(e)(2).

[459] 47 U.S.C. § 274(e)(2). Cease and desist orders regarding BOC violations of electronic publishing requirements may be obtained independently of a Section 208 complaint proceeding pursuant to Section 274. *See id.*

be discharged or made final depending on the outcome of the complaint. We further conclude that, apart from the interim enforcement actions authorized under Sections 260(b) and 275(c), the Commission retains discretion under Section 4(i) of the Act to entertain requests for interim relief in other Title II complaint proceedings involving alleged violations of the Act or our rules and orders.[460] We disagree with commenters who claim that Section 312 procedures must be applied to requests for cease orders under Sections 260(b) and 275(c), particularly since these sections make it clear that the complainants, not the Commission, have the burden of proof.[461] By contrast, Section 312(c) states that "both the burden of proceeding with the introduction of the evidence and the burden of proof shall be upon the Commission."[462] The commenters' reliance on *General Telephone* is misplaced. That case stands for the proposition that the Commission may properly invoke Section 312(b) in carrying out its functions under Title II, not that the Commission is compelled to use Section 312 procedures in determining if a carrier should be required to discontinue a particular practice on a temporary or interim basis.[463] Sections 260(b) and 275(c), and Section 4(i) generally, clearly empower the Commission to act promptly to restrain, on a temporary or interim basis, apparent or *prima facie* violations of the Act and our rules and orders without resorting to Section 312 procedures.[464]

160. With regard to cease and desist orders under Section 274(e)(2), we conclude that Congress intended to assign the same meaning to "cease and desist" orders in Section 274(e)(2) as used for "cease and desist" orders in Section 312 of the Act. Section 274(e)(2) simply authorizes parties to petition the Commission for cease and desist orders based on alleged violations of the requirements of Section 274. There is no support in Section 274 or elsewhere in the Act for applying procedures other than those

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460 *See* 47 U.S.C. § 154(i) ("[t]he Commission make perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"). *See also United States v. Southwestern Cable Co., Midwest Television Inc. v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968).

461 Sections 260(b) and 275(c) state that a complaint must contain an appropriate showing of a violation to warrant issuance of a cease order prior to a decision on the merits of the complaint. None of the commenters attempt to reconcile the requirements of Section 312(b) - (d) with language in Sections 260(b) and 275(c) which direct the Commission to issue cease orders within sixty days once such showing has been made.

462 47 C.F.R. § 312(c).

463 In *General Telephone*, a case involving an improper extension of lines by a carrier under Section 214 of the Act, 47 U.S.C. § 214, the petitioners challenged the Commission's use of Section 312 cease and desist orders to arrest the continued construction and operation of certain channel distribution systems because they argued that Section 214(c) of the Act was the Commission's exclusive mechanism for remedying violations of Section 214. *General Telephone*, 413 F.2d at 404. The court held that the Commission's imposition of a cease and desist order under Section 312 was lawful because the language of 312 made clear that it could be used in non-Title III cases. *Id.*

464 We note as a general matter that, unless otherwise prescribed by the Act, parties have the option of pursuing claims against common carriers based on alleged violations of the Act either before the Commission or in federal court. *See* 47 U.S.C. § 207. The Act does not restrict the courts' ability to consider requests for temporary or permanent injunctive relief in actions filed pursuant to Section 207 of the Act. We conclude here that we are not constrained by Section 312 in considering request for such actions in Title II complaint cases.

prescribed in Section 312 for acting on requests for such cease and desist orders. We conclude that, in contrast to the permanent or preliminary injunctive relief required under Sections 260(b) and 275(c), Congress intended the cease and desist orders contemplated under Section 274(e)(2) to be in the nature of final injunctive orders to be issued in conformance with the notice and opportunity for hearing requirements of Section 312 of the Act.[465]

2. Legal and Evidentiary Standards

a. The *Notice*

161. We proposed to amend our rules to delineate the legal and evidentiary standards necessary for obtaining cease and cease and desist orders pursuant to Title II of the Act and other forms of interim relief in Section 208 formal complaint cases.[466] We noted that creating minimum legal and evidentiary standards would expedite the issuance of cease and cease and desist orders within statutory deadlines and create more certainty in the industry as to the legal and factual basis for obtaining such injunctive or interim relief.[467] We noted further that, when a court considers requests for various types of interim or injunctive relief, such as a temporary restraining order, it generally requires that the plaintiff demonstrate four factors: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of the injunctive relief requested; (3) no substantial injury to any other party; and (4) that issuance of the order will further the public interest.[468] Courts have also required the posting of bond in some cases prior to granting interim relief.[469]

162. Few parties responded in detail to our requests for comment in the *Sections 260, 274, 275 NPRM* regarding (1) the "appropriate showing" required for the Commission to issue a "cease" order pursuant to Section 260(b) or 275(c); (2) whether it would be sufficient for the complainant to make a

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[465] A final or perpetual injunction is an injunction which finally disposes of a proceeding and is indefinite in term. *Black's Law Dictionary* at 784 (6th ed. 1990). Generally, a cease and desist order may be issued under Section 312 only where, after an opportunity to be heard not less than thirty days after receipt of an order to show cause, a respondent has been found to have violated a provision of the Act or Commission rule or order.

[466] *Notice* at 20849.

[467] *Notice* at 20849.

[468] *Notice* at 20849-50. *See, e.g., Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*"); *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[469] *Notice* at 20850. *See, e.g.*, Federal Rules of Civil Procedure 65(c), stating that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c).

prima facie showing of discrimination to obtain a cease order; (3) the meaning of "cease engaging in" under Sections 260(b) and 275(c); and (4) whether Sections 260(b) and 275(c) give the Commission the authority to issue a cease and desist order similar to the action contemplated in Section 274(e)(2) and, if so, whether the showing required to obtain cease orders and cease and desist orders should differ in any material way.[470] Accordingly, the *Notice* sought additional comment on these issues and emphasized that all comments pertaining to enforcement issues in response to the *Sections 260, 274, 275 NPRM* would be incorporated by reference into the instant proceeding.[471] We also asked parties to comment on (1) the meaning of the terms "material financial harm" as used in Sections 260 and 275; (2) whether a showing of material financial harm should also be required in order to obtain a cease and desist order under Section 274; and (3) the level of proof required to establish material financial harm in the context of a Section 208 complaint proceeding.[472]

b. Comments

163. Many of the commenters, including BellSouth, CompTel, PTG, NYNEX, SWBT, and U S West, support the use of the traditional four-prong injunction test articulated in *Virginia Petroleum Jobbers* (i.e., likelihood of success, threat of irreparable harm, no substantial injury to other parties, and the furtherance of the public interest)[473] for issuing cease orders pursuant to Sections 260 and 275 and cease and desist orders pursuant to Section 274.[474] These commenters claim that this test will minimize the chance of harm to a carrier should the allegations ultimately prove to be groundless.[475] GST,

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[470] *See Sections 260, 274, 275 NPRM*, para. 84:

> [W]e seek comment on what type of showing constitutes an "appropriate showing" for the Commission to issue the LEC an order "to cease engaging" in an alleged violation of sections 260 or 275. Would it be enough for the complainant to establish a prima facie showing of discrimination? We also seek comment on the meaning of an order "to cease engaging" under sections 260(b) and 275(c). Do these sections give the Commission authority to issue a cease and desist order similar to the one in section 274(e)(2)? If so, parties should comment on whether the showing under section 274 differs in any material respect from the showing required under sections 260 and 275.

[471] *Notice* at 20851.

[472] *Notice* at 20851.

[473] *Virginia Petroleum Jobbers*, 259 F.2d at 925.

[474] BellSouth Comments at 17; CompTel Comments at 9; PTG Comments at 24; NYNEX Comments at 11-12; SWBT Comments at 9; U S West Comments at 16-17.

[475] BellSouth Comments at 17; CompTel Comments at 9; PTG Comments at 24; NYNEX Comments at 11-12; SWBT Comments at 9; U S West Comments at 16-17.

CompTel, KMC, MFS, and PTG also argue that complainants should be required to post a bond to pay for the carrier's damages if the Commission later finds that the complaint was without merit.[476]

164. TRA, ICG and the cable entities argue for more relaxed standards, especially for resellers and small market entrants.[477] They urge the Commission to retain only the elements of the traditional test relating to advancement of the "public interest" and "no substantial injury to other parties."[478] ICG contends that the "likelihood of success" and "irreparable harm elements" inherently favor the status quo, which is contrary to Congress' goal of expediting effective local exchange competition.[479] According to the cable entities, the Commission should require a moving party to show only that it has mounted a "substantial challenge" to a carrier's practice.[480] TRA recommends that if the Commission decides to apply the traditional four-part test for injunctive or interim relief, it should define "irreparable harm" to include a showing of "serious damage to a resale carrier's business."[481]

165. The Alarm Industry Communications Committee ("AICC") and Voice-Tel argue that a *prima facie* showing of discrimination should be sufficient to warrant issuance of a cease order against an incumbent LEC pursuant to either Section 260(b) or Section 275(c).[482] ATSI contends that an "appropriate showing" for a cease order under Section 260 would be a complainant's showing it had requested service or access from an incumbent LEC and that such request was denied or unduly delayed in violation of Section 260 on more than one occasion and that such violations would continue absent a cease order. According to ATSI, the Commission should apply the following two presumptions in considering requests for cease orders in such cases: (1) if any incumbent LEC is offering a basic service pursuant to Section 260, then any other incumbent LEC should have the capability to do the same; and (2) if an incumbent LEC has the capability to provide telemessaging service, then a telemessager should be able to access the LEC's network for purposes of providing similar telemessaging service.[483]

166. Bell Atlantic argues that a cease or cease and desist order could be issued under Sections 260, 274, or 275 only if a complainant produces facts that show that (1) the alleged discriminatory behavior has occurred or will soon occur, (2) that the behavior violates the Act and/or the Commission's

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[476] GST Comments at 16; KMC Comments at 16; MFS Comments at 16; CompTel Comments at 9; PTG Comments at 24.

[477] ICG Comments at 18; TRA Comments at 21; Cable Entities Reply at 14.

[478] ICG Comments at 18-20; TRA Comments at 21.

[479] ICG Comments at 19-20.

[480] Cable Entities Reply at 14.

[481] TRA Comments at 21.

[482] *See* AICC Comments to *Sections 260, 274, 275 NPRM* at 31-32; Voice-Tel Comments to *Section 260, 274, 275 NPRM* at 14.

[483] ATSI Comments to *Section 260, 274, 275 NPRM* at 12.

rules, and (3) that it has or will cause substantial harm to the complainant.[484] PTG contends that cease orders should be issued pursuant to Section 260 only after the complainant has shown by a preponderance of the evidence that an incumbent LEC has violated Section 260(a) and that the violation was the proximate cause of the complainant's material financial harm.[485] PTG argued that an order to "cease engaging" under Sections 260 and 275 should be more difficult to obtain than an order to "cease and desist" under Section 274 because Sections 260 and 275 require a showing of "material financial harm."[486] SWBT contends that the standard under Section 274(e), which authorizes any person to "make application to the Commission" for a cease-and-desist order, should be at least as demanding as Section 1.722 of the Commission's rules, which requires complainants seeking damages to demonstrate or quantify the harm suffered or damages incurred with reasonable certainty.[487] SWBT maintains that cease orders under Sections 260(b) and 275(c), on the other hand, should require more stringent proof because those sections direct the Commission to issue such orders upon an appropriate showing of material financial harm in the complaint.[488] Voice-Tel asserts that the Commission's authority under Sections 260, 274 and 275 is the same, contending that the language between the two provisions is different only because Section 274 gives the complainant the option of obtaining relief in federal court.[489]

167. Several commenters contend that what constitutes material financial harm under Sections 260 and 275 should be decided on a case-by-case basis.[490] AICC, ATSI, and Voice-Tel proposed that all cases involving denial of access or delay would always result in material financial harm and that material financial harm need not be quantified in such cases.[491] BellSouth maintains that a showing of material financial harm must establish a causal relationship between the harm and the defendant carrier's actions and should exclude unsupported claims of "lost opportunity."[492] According to PTG, a showing of material financial harm should consist of testimony, supported by affidavit, regarding (1) the magnitude of the alleged harm; (2) the relationship of the harm to the alleged violation, and (3) the impact of the harm on

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[484] Bell Atlantic Comments to *Section 260, 274, 275 NPRM* at 15.

[485] PTG Comments to *Section 260, 274, 275 NPRM* at 29-30.

[486] PTG Comments to *Section 260, 274, 275 NPRM* at 29-30.

[487] SWBT Comments to *Section 260, 274, 275 NPRM* at 26-27, *citing* 47 C.F.R. § 1.722(a).

[488] SWBT Comments to *Section 260, 274, 275 NPRM* at 26-27

[489] Voice-Tel Comments to *Section 260, 274, 275 NPRM* at 14.

[490] Bell Atlantic Comments to *Section 260, 274, 275 NPRM* at 16; ATSI Comments to *Section 260, 274, 275 NPRM* at 11; SWBT Comments to *Section 260, 274, 275 NPRM* at 25.

[491] AICC Comments to *Section 260, 274, 275 NPRM* at 31; ATSI Comments to *Section 260, 274, 275 NPRM* at 11; Voice-Tel Comments to *Section 260, 274, 275 NPRM* at 13.

[492] BellSouth Comments at *Section 260, 274, 275 NPRM* at 9.

the complainant's business prospects.[493] PTG, SWBT, and USTA all argue that a *prima facie* case of material financial harm must include some quantification of the alleged harm.[494]

168. Finally, none of the commenters, either in this proceeding or in the *Sections 260, 274, 275 NPRM*, addressed the issue of whether a showing of material financial harm, as the term is used in Sections 260 and 275, should also be required in order to obtain a cease-and-desist order under Section 274, although some argued that the same standards and procedures should (or should not) apply to cease and cease and desist orders.[495]

c. Discussion

169. Notwithstanding our proposals in the *Notice*, we conclude that, apart from the specific requirements set forth in the Act and our implementing rules and orders, it is unnecessary at this time to prescribe the legal and evidentiary showings required to obtain cease orders in Section 260(b), 275(c), and other Section 208 complaint proceedings. We similarly conclude that we need not delineate the showing needed for a cease and desist order under Section 274(e)(2). The commenters differ sharply over these issues. Many argue that the four-pronged test set forth in *Virginia Petroleum Jobbers* should be relaxed to promote the pro-competitive goals of the Act, while an equal number contend that the *Virginia Petroleum Jobbers* standard, or its equivalent, is necessary to protect the due process rights of defendant carriers. After weighing the various comments, we conclude that it is more appropriate to consider requests for interim or injunctive relief on a case-by-case basis. It is impossible to anticipate all of the various factual circumstances that could form the basis of a complaint. Similarly, the level and types of information necessary to sustain or refute allegations of misconduct by carriers is likely to vary widely. We note that the rules we adopt today will foster our ability to consider requests for interim and injunctive relief and to order such relief promptly in appropriate cases. In particular, our pre-filing settlement discussion requirement should promote the ability of both complainants and defendants to ascertain the legal and factual bases of their dispute and submit detailed, fact-based complaints and answers accordingly.[496] Our new format and content requirements are designed to ensure that both complaints and answers contain full legal and factual support for or against the relief requested in the complaint.[497] Thus, as a practical matter, we do not anticipate that the absence of specific legal and evidentiary guidelines in this Report and Order will require complainants and defendant carriers to incur any additional or otherwise unreasonable burdens in presenting and defending against requests for interim injunctive relief.

170. We also conclude that we need not describe the specific showing required of a complainant to establish "material financial harm" within the meaning of Sections 260 and 275 of the Act. Generally, a complainant alleging material financial harm will be expected to demonstrate some nexus between its financial condition or results and the defendant carriers' allegedly unlawful behavior within

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[493] PTG Comments to *Section 260, 274, 275 NPRM* at 29.

[494] PTG Reply to *Section 260, 274, 275 NPRM* at 23; SWBT Comments to *Section 260, 274, 275 NPRM* at 26; USTA Reply to *Section 260, 274, 275 NPRM* at 4-5.

[495] *See, e.g.*, VoiceTel Comments to *Section 260, 274, 275 NPRM* at 14.

[496] *See supra* "Pre-Filing, Certification of Settlement Attempts" section.

[497] *See supra* "Format and Content Requirements, Support and Documentation of Pleadings" section.